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Motions

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: GLOBAL BROKERAGE, INC.  
4 f/k/a FXCM, Inc. SECURITIES LITIGATION 17 Civ. 916 RA  
17 Civ. 955 RA  
17 Civ. 1028 RA  
5 17 Civ. 2506 RA

6 -----x

7  
8  
9 March 1, 2018  
10 11:07 a.m.

11  
12 Before:

13 HON. RONNIE ABRAMS,

14 District Judge

15  
16 APPEARANCES

17  
18 THE ROSEN LAW FIRM,  
Attorneys for plaintiffs  
19 BY: PHILLIP KIM, Esq.  
JOSH BAKER, Esq.  
20 Of counsel

21  
22 KING & SPALDING,  
Attorneys for defendants  
23 BY: PAUL R. BESSETTE, Esq.  
ISRAEL DAHAN, Esq.  
24 Of counsel

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1 (In open court)

2 (case called)

3 THE COURT: Good morning. I scheduled today's  
4 conference to discuss defendants' motion to dismiss and the  
5 motion to strike. Defendants requested oral argument. I do  
6 believe that I have enough information at this point to rule,  
7 but that being said, I am happy to hear either or both of you  
8 out and can keep an open mind. If you would like to be heard,  
9 I am happy to hear you.

10 MR. BESSETTE: Thank you, your Honor. Would you  
11 rather I speak from counsel table or the podium?

12 THE COURT: Whatever your preference is. Just speak  
13 into the microphone, please. Thank you.

14 MR. BESSETTE: I'll be brief since you said you fully  
15 have taken a look at the issues. I just want to underscore  
16 that the motion to strike, it is not clearcut based on the case  
17 law in this circuit. We had Lipsky on one side --

18 THE COURT: And there is a split in the district.

19 MR. BESSETTE: There is. The most important, the  
20 crucial point I think to be made here is that none of the  
21 plaintiffs' cases, OSC, any of the others they've cited, allow  
22 the wholesale cutting and pasting of another no-admit, no-deny  
23 settlement or other complaints.

24 At most both Gilbert and some of the district court  
25 cases from Gilbert say, sometimes bolstering allegations for

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1     scienter or knowledge or some other aspect, it may be  
2     appropriate to cite those, but no case in this district or in  
3     the Second Circuit allows what plaintiffs are trying to do,  
4     which is the wholesale cutting and pasting of another  
5     settlement into this case.

6             THE COURT: Let me ask you a question. Is the real  
7     problem with this complaint from your perspective really a  
8     problem with 12 (b)(6), in the sense is it the cutting and  
9     pasting, or is it the fact they haven't added particularized  
10    facts they need to include?

11            MR. BESSETTE: I think that is an excellent. It is  
12    really both. As Judge Torres noted in the Deutsche Bank case,  
13    if you don't particularize the allegations especially for  
14    securities fraud, unlike the no-admit, no-deny settlements with  
15    the regulators and complaints which are consumer facing, not  
16    investor actions under 10b-5 governed by PSLRA, you can't  
17    block-quote a bunch of statements and give the block, the  
18    notation on for every block of false and misleading statements  
19    they're false and misleading for the same reasons.

20            You can see that very easily, and we underscored this  
21    in the brief and it brings the point home that, for example, in  
22    some of the block-quotes, plaintiffs say well, there are false  
23    and misleading statements in the 2011 10-Ks, 2012 10-Qs and  
24    10-K, and the 2013 10-Qs for the first two quarters, and those  
25    are false and misleading because of statements Mr. Niv made

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1 after, in October 2013. That shows you the reason you can't  
2 have these block-quotes in a style in which plaintiffs have  
3 done, and they haven't done any additional work beyond what is  
4 in those settlements, and that is why it is a 12 (b)(6) PSLRA  
5 problem.

6 THE COURT: Thank you.

7 Would you like to be heard, Mr. Kim.

8 MR. KIM: Yes, your Honor, just briefly to address  
9 some of the arguments Mr. Bessette had made.

10 I think the issue of whether a securities fraud  
11 complaint can contain the allegations here of the regulatory  
12 complaint, I believe if you look at the Lipsky case and make a  
13 close reading of the Lipsky case, it makes clear it is limited  
14 to the facts of that case.

15 In that case, what happened was there was an SEC  
16 complaint that involved a different registration statement that  
17 was then the one that was at issue. The court there affirmed  
18 the striking of that complaint because it was immaterial, and  
19 because that SEC complaint had nothing to do with the  
20 registration statement at issue, and that as a result, it  
21 shouldn't be considered.

22 That is a similar reading that Judge Cote had in the  
23 VNB Realty case and Bank of America. In that case, she says  
24 the issue isn't really -- the way she read that case is the  
25 limited reading of that case, not the broad application of it.

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1 She did credit the allegations in a related complaint and then  
2 looked at it whether or not it met the PSLRA requirement.

3 What is different in this case is this isn't just a  
4 regulatory action where someone got a slap on the wrist. I  
5 have seen a lot of consent order settlements that are very  
6 vague, that say this person violated some various regulatory  
7 rules and, as a result, we're punishing them.

8 This has specific findings of fact, and if you look at  
9 the Rule 11 cases, the K-1 case that talks about whether you  
10 can rely on an SEC complaint or regulatory action, logically it  
11 makes sense that you can because the fact that FXCM set up  
12 Effex Capital, gave them a \$2 million interest-free loan, that  
13 is a fact that will be admissible at some point, right?

14 It is not a fact that is going to be inadmissible  
15 later on. That is a fact that if the New York Times had  
16 written an article, if they had written an article and said we  
17 looked into FXCM and this is what we found, we found they set  
18 up Effex Capital, which turned out to be a sham, that Effex  
19 Capital was set up by FXCM, there were secret commissions, that  
20 Effex Capital received favorable treatment, and that FXCM was  
21 driving the trading volume up to 50 percent of the trading  
22 volume to Effex Capital, an entity that they had a 70 percent  
23 interest insofar as they got 70 percent of the profits of FXCM.

24 So the notion that, you know, the notion that now FXCM  
25 didn't control Effex Capital or that they were unknowing of the

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1 wrongful conduct is just not plausible on the facts. I think  
2 the crux of their argument is well, you can't consider it, but  
3 I don't think any of the cases cited on the 12 (f) issue take  
4 the position that you shouldn't look at the underlying either  
5 complaint, the underlying findings of fact to determine on a  
6 case-by-case basis, to determine whether the court would credit  
7 such allegations.

8           The Second Circuit said that in this case, with these  
9 facts, you know, they're going to be stricken, not that in  
10 every case. I would say in this case, this is a situation  
11 where this is a very serious fraud. Let's not forget as a  
12 result of these penalties, these people agreed to never work in  
13 the industry again, and then this company agreed as a part of a  
14 resolution, and with findings of fact, that they would no  
15 longer operate in the United States.

16           When the information hit the market, the stock went  
17 down 50 percent. This is not some sort of a little regulatory  
18 issue that we're trying to trump up into a securities fraud.  
19 This is a very serious fraud. It appears from the regulatory  
20 material that the NFA and CFTC was investigating for a long  
21 time. The findings of fact indicate there was evidence they  
22 cite, they cite e-mails, and if you look at some of the  
23 language in the cases that reject pleadings, they always say  
24 something we shouldn't consider a complaint at the preliminary  
25 stages.

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1           From what I can tell and from these orders, it was  
2 clear that the CFT and NFA conducted extensive discovery. We  
3 allege in the complaint there are examinations in 2013, they  
4 were asking questions about this for years, and it wasn't until  
5 the end of the class period when this information came out.

6           One other thing to put Lipsky in context, that was  
7 from 1977. That was not a PSLRA case. That is not a case here  
8 where discovery is stayed, arguably back then they could have  
9 conducted discovery. It would have been a little suspicious  
10 that they would talk about a registration statement that wasn't  
11 even the one at issue, and presumably they had the tools at  
12 hand to conduct discovery. It would have been fair for a court  
13 to say that is immaterial. We don't have that situation here.  
14 I don't think in a PSLRA case where discovery is stayed, you  
15 know, the defendants can have it both ways.

16           Unless the court has any other questions?

17           THE COURT: Just one question that is not related to  
18 what we were just talking about. Do you concede the  
19 relationship between Effex and FXCM, whatever the nature of  
20 that relationship, ended in 2014?

21           MR. KIM: Well, I concede that the defendants contend  
22 that they canceled this contract which we claim was part of the  
23 sham transaction. I think the NFA says something like we  
24 believe this continued through at least 2014.

25           In the complaint, we say we believe it continued

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1 through 2016, but clearly if you take a fair look at the  
2 complaint, most of the facts that we have of particularity deal  
3 with conduct from 2014 and before.

4 THE COURT: All right. Thank you very much.

5 Nothing that has been said today changes my view in  
6 terms of the complaint and the motion to dismiss. The parties  
7 are both familiar with the consolidated class action complaint  
8 and the facts alleged therein, so I am not going to recite them  
9 here on the record. In the interest of moving the case along  
10 quickly, I am going to jump into the legal issues and I am  
11 going to rule orally today. I encourage you all to obtain a  
12 transcript of today's ruling.

13 For the reasons that I will explain, I am denying  
14 defendants' motion to strike, and I am granting defendants'  
15 motion to dismiss, but I am going to do so without prejudice  
16 and I am going to grant plaintiffs' leave to amend. When they  
17 do so, plaintiffs should carefully consider defendants'  
18 arguments in this oral ruling and respond appropriately in  
19 their proposed amended complaint or their amended complaint, as  
20 I'm authorizing them to file one, if they have a good-faith  
21 basis for doing so.

22 As the parties are aware, claims under Section 10(b)  
23 of the Exchange Act must meet the requirements of Rule 9(b) of  
24 the Federal Rules of Civil Procedure and of the Private  
25 Securities Litigation Reform Act (PSLRA), 15 U.S.C. Section



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1 78u-4(b). Rule 9(b) requires a plaintiff to, among other  
2 things, specify the statements that the plaintiff contends were  
3 fraudulent and explain why the statements were fraudulent.

4 ATSI Communications, Incorporated 493 F.3d at 99. The  
5 PSLRA similarly requires a plaintiff specify each statement  
6 alleged to have been misleading and the reason or reasons why  
7 the statement is misleading. That is from Section 78u-4(b)(1).

8 To state a claim under Section 10(b), Rule 10b-5, and  
9 Section 20 (a), plaintiffs must allege the defendants:

10 One, made misrepresentations or omissions of material  
11 fact;

12 Two, with scienter;

13 Three, in connection with the purchase or sale of the  
14 securities;

15 Four, upon which plaintiffs relied; and

16 Five, that the plaintiffs' reliance was the proximate  
17 cause of their injuries. ATSI, 493 F.3d at 105.

18 First I'll briefly address defendants' motion to  
19 strike all the allegations drawn from the unadjudicated CFTC  
20 ordered and NFA complaint.

21 As the parties recognize and as we discussed this  
22 morning, there is a split within this district as to how to  
23 interpret the Second Circuit's Lipsky case. That is 551 F.2d  
24 887. I reviewed the relevant cases, and I am most persuaded by  
25 the judges who have adopted a narrower reading of Lipsky. In

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1 particular, I found particularly persuasive Judge Cote's  
2 reading of Lipsky in the VNB Realty case, 2003 WestLaw 5179197,  
3 with which Judge Torres also agreed in the Deutsche Bank case,  
4 2017 WestLaw 4049253.

5 As Judge Cote explained, Lipsky does not create a per  
6 se rule that all excerpts from unadjudicated consent orders and  
7 complaints must stricken. Rather, the question should be, as  
8 always, whether Rule 12(f) applies. That rule permits striking  
9 a complaint only of redundant, immaterial, impertinent or  
10 scandalous matters, and as the Circuit explained in Lipsky,  
11 motions to strike should be denied unless it can be shown that  
12 no evidence in support of the allegation would be admissible  
13 and there is a strong reason to strike the complaint.

14 Although the consent order and complaint on which  
15 plaintiffs rely here may not be admissible evidence themselves,  
16 at this stage I agree with plaintiffs that they need only  
17 allege facts that, upon their information and belief, will  
18 likely lead to admissible evidence in discovery. See in re:  
19 OSC Securities Litigation, 12 F.Supp.3d at 622. If plaintiffs  
20 uncovered evidence of their allegations through discovery, that  
21 evidence would likely be material and relevant. Thus,  
22 defendants have failed to show there is a strong reason to  
23 strike the complaint, and I am denying their motion.

24 I'll note, however, that fraud allegations can be made  
25 upon information and belief only where the matters alleged are

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1 peculiarly within the opposing party's knowledge and plaintiffs  
2 state with particularity all facts on which that belief is  
3 formed, as they're required to do under 15 U.S.C. Section  
4 78u-4(b)(1). See the Loreley case, 797 F.3d, at 180.

5 Plaintiffs certainly could do a better job in their  
6 complaint of stating with particularity all facts on which  
7 their information and belief is founded and is stating the  
8 basis or fair view the information is peculiarly within the  
9 defendants' knowledge. If plaintiffs fail to substantiate  
10 their allegations with specific facts as necessary under the  
11 PSLRA Rule 9, however, that will be a problem under Rule  
12 12(b)(6) and not under 12(f). Plaintiffs will have an  
13 opportunity to provide more detailed allegations, to the extent  
14 that they can do so, in good faith because I am granting  
15 defendants' motion to dismiss without prejudice, for the  
16 reasons I'll now explain.

17 Before I turn to the substance of defendants' motion  
18 to dismiss, I'll briefly address the parties' disputes over  
19 what external materials are appropriate for me to consider at  
20 this stage. Even on a motion to dismiss, the court may  
21 consider any written instrument attached to the complaint,  
22 statements or documents incorporated into the complaint by  
23 reference, legally required public disclosure documents filed  
24 with the SEC, and documents possessed by or known to the  
25 plaintiff and upon which it relied in bringing this suit.

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1 That's from ATSI Communications, 493 F.3d at 98.

2 Accordingly, I am taking judicial notice of the  
3 existence and internal contents of all publicly available,  
4 legally required SEC filings that the parties have submitted.  
5 I am denying, however, defendants' request to take judicial  
6 notice of the various other documents they attach to their  
7 motion papers. I am doing so without prejudice for now,  
8 because none of the documents are necessary to my decision  
9 today.

10 Because I am not considering the exhibits that are not  
11 SEC filings for now, I am denying plaintiffs' request to file a  
12 sur-reply to respond to those documents.

13 In defendants' motion, they argue that the complaint  
14 must be dismissed under Rule 12(b)(6) on the basis plaintiffs  
15 have failed to plead with sufficient facts, failed to plead  
16 sufficient facts to state a claim under Rule 10b-5, and Section  
17 20(a).

18 As for defendants' 10b-5 arguments, they first argue  
19 that plaintiffs have failed to satisfy the PSLRA and Rule  
20 9(b)'s heightened pleading requirements for identifying and  
21 explaining the allegedly fraudulent statements. In particular,  
22 defendants note how the complaint uses long block-quotes from  
23 the relevant filings and then simply repeats an identical  
24 explanation for why those long excerpts are fraudulent or  
25 misleading.

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1 I agree with defendants on this point. The Second  
2 Circuit has repeatedly stated that plaintiffs must demonstrate  
3 with specificity why and how individual statements are false.  
4 Simply stating that they're false is not enough. See the  
5 Rombach case, 355 F.3d at 174.

6 Similarly, this Court should not have to search the  
7 long quotations in the complaint for particular false  
8 statements and then determine on its own initiative how and why  
9 the statements were false and how other facts might show a  
10 strong inference of scienter. That is a quote from the Boca  
11 Raton Firefighters case, 506 Fed.App'x at 38.

12 Yet that is exactly what the complaint here requires.  
13 Plaintiffs' block-quote long statements from the FXCM's SEC  
14 filings throughout their complaint. And then plaintiffs  
15 explain why those block-quoted statements are false with the  
16 same paragraph listing the same four reasons for every set of  
17 statements despite the fact that those statements vary,  
18 sometimes slightly and sometimes significantly from filing to  
19 filing.

20 Indeed, an identical paragraph with those purported  
21 reasons is pasted in 12 places in the complaint. Paragraphs  
22 126; 136; 146; 153; 163; 174; 189; 200; 209; 220; 229; and 242.

23 The four reasons listed in those paragraphs are as  
24 follows:

25 One, from September 4th, 2019 through at least 2016,

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1 FXCM engaged in false and misleading solicitations of its  
2 retail foreign exchange customers by concealing its  
3 relationship with its most important market-maker, Effex, and  
4 by misrepresenting that its NDD platform had no conflicts of  
5 interest with its customers;

6 Two, FXCM was earning illicit profits on its NDD  
7 platform, as it was on both sides of its customers' trades  
8 through its arrangements with Effex, in direct contravention to  
9 its stated core business;

10 Three, FXCM and defendant made false statements to NFA  
11 about the company's relationship with Effex;

12 Four, as a result, defendants' statements about FXCM's  
13 business operations and prospects were materially false and  
14 misleading and/or lacked a reasonable basis at all relevant  
15 times.

16 The same four reasons are also listed as explanations  
17 for why defendants' Sarbanes Oxley certifications are false and  
18 misleading in 13 other places, with just one additional  
19 purported reason, which was that, "the accompanying financial  
20 statements were false as they failed to consolidate Effex and  
21 failed to disclose material related-party transactions  
22 involving Effex."

23 These four or five -- and I am referring to these as  
24 explanations of falsity -- are applied indiscriminately to a  
25 wide range of different types of statements. Yet the

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1 explanations fail to actually explain why many of those types  
2 of statements are false.

3 For example, plaintiffs repeatedly cite as fraudulent  
4 SEC filings where FXCM states the percentage of its total net  
5 revenues or total trading revenues that its retail trading  
6 segment accounted for, but it is unclear from the complaint why  
7 plaintiffs are saying that those statements are false and  
8 misleading. I can't tell whether plaintiffs are contesting the  
9 precise percentage quoted, let alone why plaintiffs believe  
10 that any such misstatement was material or why they believe  
11 there was scienter as to those particular statements. If  
12 plaintiffs are complaining only about the emphasis defendants  
13 placed on the importance of the retail trading revenue, then  
14 they still have not explained with particularity why that was a  
15 misrepresentation.

16 Similarly, plaintiffs completely fail to explain in  
17 their complaint, as opposed to in their papers responding to  
18 defendants' motion to dismiss, why defendants' statements of  
19 their belief that their agency model aligns their interests  
20 with those of their customers was materially false or  
21 misleading to investors.

22 Plaintiffs concede in their papers that if this is a  
23 statement of opinion, plaintiffs must plead the defendants did  
24 not actually hold that belief to plead its falsity, but nowhere  
25 in the complaint do they actually make such allegations.

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1           There are many other examples of statements listed or  
2 block-quoted as misleading or false, with no particularized  
3 explanation. Some of those statements change slightly but  
4 perhaps materially from section-to-section in the complaint  
5 compared just, for example, the block-quoted text in Paragraphs  
6 152 and 162, for example, but there is no explanation of how or  
7 why these differences might matter.

8           There are other parts of the complaint that similarly  
9 failed to meet the heightened pleading standard, and I am not  
10 going to go through all of these problems now.

11           In short, plaintiff cannot circumvent Rule 9 and the  
12 PSLRA simply by, "Employing the same conclusory formula  
13 multiple separate times to cover all of the allegedly material  
14 misrepresentations" a quote from the Deutsche Bank case, 2017  
15 WestLaw 4049253.

16           Plaintiffs complaint, thus, "does not comport with our  
17 exhortation that plaintiffs must demonstrate with specificity  
18 why and how each statement is materially false or misleading.  
19 Boca Raton Firefighters, 506 Fed.App'x at 37-38.

20           And if plaintiffs seek to allege certain material  
21 omissions, they must allege a duty to disclose particular  
22 facts. See In re Lululemon Securities Litigation, 14 F.Supp.  
23 3d at 572. Moreover, even if I were to consider the four or  
24 five reasons cited by plaintiffs, those reasons are extremely  
25 conclusory and at times have no conceivable relation to the



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1 statements they purport to explain.

2 For example, it is unclear to me why FXCM and  
3 Defendant Niv's allegedly false statement to the NFA about the  
4 company's relationship with Effex could explain why FXCM's  
5 other statements in its SEC filings were false. The  
6 plaintiffs' generalized explanation all of defendants'  
7 statements about FXCM's business operations and prospects were  
8 materially false and misleading and/or lacked a reasonable  
9 basis at all relevant times because of the allegedly sham  
10 relationship between FXCM and Effex is far from the level of  
11 specificity required by Rule 9 and the PSLRA.

12 To survive a motion to dismiss under these standards,  
13 plaintiffs need to make it clear what exactly they're saying  
14 was false and misleading and they need to allege specific facts  
15 demonstrating that falsity. The conclusory and circular  
16 reasoning currently in the complaint falls well short of that  
17 standard.

18 Furthermore, plaintiffs must allege facts allowing  
19 this Court to conclude that the statements were false at the  
20 time that they were made. See *in re: Lululemon Securities*  
21 *Litigation*, 14 F.Supp.3d at 571. If the plaintiffs amend their  
22 complaint, they should be sure to specifically allege the time  
23 period during which they say defendants had the allegedly  
24 improper relationship with Effex and to state the facts upon  
25 which they base those allegations.

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1 Defendants also argue that plaintiffs have failed to  
2 allege scienter with particularity. For the reasons I've  
3 already said, it is difficult to allege scienter with  
4 particularity when the fraudulent misstatements or omissions  
5 have not been identified or explained with particularity, but  
6 even as to the statements which plaintiffs have arguably  
7 identified and explained sufficiently, they must do more to  
8 properly plead scienter.

9 Generally speaking, plaintiffs can allege scienter by  
10 establishing motive and opportunity or by demonstrating the  
11 strong circumstantial evidence of conscious misbehavior or  
12 recklessness. See the ECA case, 553 F.3d at 198. In their  
13 papers, plaintiffs seem to concede that they have not alleged  
14 motive and opportunity, but rather focus on the individual  
15 defendants' access to information about the alleged true nature  
16 of the relationship between FXCM and Effex Capital and alleged  
17 attempts to cover up the purported relationship. When  
18 plaintiffs rely on the "strong circumstantial evidence" test  
19 without alleging motive, the strength of the circumstantial  
20 allegations must be correspondingly greater. That is a quote  
21 from the ECA case, 553 F.3d at 198.

22 To allege fraudulent intent under plaintiffs' theory,  
23 plaintiffs must do more than allege the individual defendants  
24 were aware of the order-flow arrangement with Effex. Plaintiff  
25 must allege sufficient facts as to each defendant to make it

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1 cogent and at least as compelling as any opposing inference  
2 that the defendants' statements, whatever they were, were made  
3 with fraudulent intent. Part of that was a quote from the  
4 Tellabs case, 551 U.S. at 314.

5 I am not persuaded at this point plaintiffs have met  
6 the pleading requirement. When plaintiffs amend their  
7 complaint, they should clarify exactly what facts form their  
8 basis for believing each defendant was not acting on a  
9 good-faith basis and their attempts to preserve corporate  
10 formalities between Effex and FXCM were legally and financially  
11 sufficient to avoid fraudulent statements. Plaintiffs must  
12 also focus on why there was intent to defraud investors as  
13 opposed to customers.

14 Now I'll turn to plaintiffs' Section 20(a) claims  
15 against the individual defendants. Although I can dismiss this  
16 claim on the same grounds that I've articulated already, I am  
17 going to further advise plaintiffs that as I explained in the  
18 Lihua International Securities Litigation, 2016 WestLaw  
19 1312104, plaintiffs must plead culpable participation by each  
20 of the individual defendants with particularity in order to  
21 state a claim under Section 20(a).

22 Thus, plaintiffs must do more than simply state, as  
23 they have done in the current complaint, each of the  
24 individuals was aware of or recklessly disregarded the fact  
25 that the false and misleading statements were being issued

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1 concerning the company. Rather, plaintiffs must allege facts  
2 sporting a strong inference of scienter for each particular  
3 alleged misrepresentation. They have not done so in the  
4 current version of the complaint. This, therefore, is an  
5 alternative ground for dismissing the 20(a) claims without  
6 prejudice.

7           Look, I can imagine ways in which some of the  
8 statements buried in the block-quotes from defendants' annual  
9 reports may be actionable, but plaintiffs need to tease apart  
10 the statements in the various filings, organize them in a  
11 useful way, and explain why and how exactly each particular  
12 statement or category of statements was fraudulent. And then  
13 they need to provide specific facts supporting a strong  
14 inference of scienter for those statements.

15           To the extent the plaintiffs are relying on  
16 information and belief as they seek discovery of admissible  
17 evidence going forward, they must also state with particularity  
18 the facts on which they are basing their information and belief  
19 as well as the basis for their view that the knowledge they  
20 seek is particularly within defendants' possession.

21           For these reasons, I am denying the motion to strike.  
22 I am granting the motion to dismiss with prejudice. I am also  
23 denying plaintiffs' request to file a sur-reply. I'll allow  
24 plaintiffs to amend their complaint, and I hope that they take  
25 the opportunity to respond in good faith to the arguments

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1 defendants have already raised as well as the points that I've  
2 made in this ruling.

3 How much time do you think you need?

4 MR. KIM: 35 days, your Honor, just so that we can get  
5 the transcript and parse through the decision.

6 THE COURT: That is fine. I want to say April 6th.

7 MR. KIM: That works.

8 THE COURT: If I said "with prejudice," I meant  
9 "without prejudice." I think I was just looking at the  
10 transcript. I think I misspoke. It is clearly without  
11 prejudice because I am granting leave to amend. You will have  
12 until April 6th to file your amended complaint, and how long  
13 would defendants like to respond?

14 MR. BESSETTE: If we can have 30 days, your Honor?

15 THE COURT: That is fine. So why don't we say May 7th  
16 is the Monday, so why don't we say May 7th for a responsive  
17 pleading. Is there a need for a red-line version of the  
18 amended complaint from defendants' perspective?

19 Is that not necessary?

20 MR. DAHAN: Your Honor, if it is going to be a  
21 wholesale rewrite, probably not. I am sure we can figure it  
22 out.

23 THE COURT: Why don't we figure it out. Assume we'll  
24 get the amended complaint by April 6th, have responsive  
25 pleading by May 7th, and to the extent you feel it is

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1 necessary, you'll let me know. All right. Are there any  
2 applications at this time?

3 MR. KIM: Not from plaintiff, your Honor.

4 MR. BESSETTE: No, your Honor.

5 THE COURT: All right. Thanks. Have a nice  
6 afternoon, all.

7 (Court adjourned)